BRIEF IN SUPPORT OF PETITION

Opinions Below

The decision, findings of fact, conclusions of law and order of the National Labor Relations Board are reported in the Board's Decisions and Orders Vol. 45, pages 799-811 (R. 335-354). The opinion of the United States Circuit Court of Appeals for the Second Circuit, in which the order of the National Labor Relations Board was approved, is reported in 138 F. 2d 884 (R. 361-362). The opinion of said Court in *National Labor Relations Board* v. *Standard Oil Co. et al*, referred to in the Court's opinion in the *Kaplan* case, is reported is 138 F. 2d 884. The pertinent parts of said opinion are printed in the Petition herein, pages 4-6.

Jurisdiction

Note Petition (supra, p. 7).

Statement of the Case

This case came before the Court below on the petition of the Board under Sec. 10 (e) of the Act for enforcement of its order against Petitioners issued November 27, 1942 (R. 335-354). The order required Petitioners to "cease and desist" from violating practically every provision of the Act (R. 352-353). The Circuit Court, Second Circuit sustained the order (R. 361-362).

The order was based on the following evidence:

In June 1941, Lombardi, Petitioners forelady, is alleged to have asked Doran and De Filippi, another employee to dissuade other employees from joining a union on the

statement that if a union was successful Petitioners would close down (R. 54). Doran admitted that she never bothered to influence any of the employees (R. 54).

There is no evidence that Lombardi pressed the point or that any action was taken against Doran because she didn't bother. There was no evidence that Lombardi's statement was ever made known to Petitioners or was authorized by them.

On April 27, 1942, Lombardi is alleged to have stated to De Filippi, that Doran and De Filippi had attended a union meeting. De Filippi testified that Lombardi had only mentioned that she knew De Filippi was at the meeting (R. 14-15, 18) and that when she told Doran that Lombardi knew Doran was at the meeting, she based that statement on the assumption that Lombardi knew they were close friends (R. 29-30) and wherever De Filippi went, Doran also went (R. 25, 31-32).

The Trial Examiner realized that it was vital to prove that Lombardi actually knew that Doran attended the union meeting, otherwise the Board could not ascribe an illegal motive to Doran's discharge (R. 29). De Filippi, the Board's own witness (R. 45), and the only witness who spoke to Lombardi, denied that Lombardi ever said to her that she knew that Doran attended a union meeting (R. 14-15, 18).

On May 6, 1942, Doran was discharged by Lombardi (R. 75). The circumstances according to Doran were: Louise, another floorgirl, came to her and asked for work. Doran told her she had no time to give it to her. She told her to take it herself (R. 69). Louise said she would tell Lombardi (R. 69). Ten minutes later Lombardi called Doran over and discussed the incident (R. 69). Lombardi again spoke to Doran, accusing her of being fresh in the way she acted and stating it was Doran's duty to give Louise the work (R. 72-73). This led to angry words between them and Lombardi said she was fired (R. 74-75).

Lombardi testified that the incident started in the same way, but when she spoke to Doran about it, Doran in a loud tone of voice replied that she wanted Lombardi to understand that she had no time to give Louise any work (R. 228). Then Lombardi asked her "Isn't there any difference in the position between us" (R. 231); Doran replied, "no", and the words between them led to Doran's discharge (R. 232).

Before Lombardi went for Doran's pay she asked "Louise (Doran) * * * are you sorry" (R. 232). She would have taken her back immediately if she had apologized (R. 232). Even at the time of the hearing she was ready to reinstate Doran if she apologized (R. 233). Nowhere did Doran or any witness for the Board rebut Lombardi's statement that she offered to reinstate Doran if she apologized.

There was no evidence that any of these facts were called to the attention of Petitioners. There was no evidence that Doran sought to appeal to Petitioners over Lombardi's Decision. There was no evidence that Petitioners authorized the above incidents. There was no evidence of an anti-union policy by Petitioners.

Specification of Errors

Petitioners will urge, if the writ of certiorari is issued, that the Circuit Court of Appeals for the Second Circuit erred:

1. By holding that the "cease and desist" provisions of the Board's order were proper under the law.

2. By holding that the "cease and desist" provisions of the Board's order were proper on the facts.

3. By holding that there was substantial evidence in the record to support the material findings of facts, conclusions of law and order of the Board.

4. By holding that in the calculation of back pay to be awarded to the discharged employee, the employer was not entitled to a credit for the employee's earnings up to the date she elected to seek or not seek reinstatement.

Statute Involved

The Statute involved is the National Labor Relations Act (29 U. S. C. A., sec. 151, et seq.). The pertinent provisions of the Act are:

Sec. 7 (Sec. 157 of 29 U. S. C. A.):

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 8 (Sec. 158 of 29 U. S. C. A.):

> It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any

other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Section 10c (Sec. 160(c) of 29 U. S. C. A.):

"* * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the Board shall state its findings of fact and shall issue and cause to be served on such person, an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *".

Summary of Argument

Point 1: The petition presents a vital question of Federal Law, involving the administration of the National Labor Relations Act. This Court's decision in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 61 S. Ct. 693 has resulted in divergent interpretations by the United States Circuit Courts. The Courts of the Second and Fourth Circuits have limited the principles of the *Express Publishing* case to violations of Sec. 8 (5) of the Act. The Judges of the Second Circuit are in continuous disagreement on this point. The Courts

of the Third, Fifth, Seventh, Ninth and Tenth Circuits hold that the law of the *Express Publishing* case is applicable to violations of the Act enumerated in the other subdivisions of Sec. 8. The confusion will continue until "some authoritative word shall be said" (Petition, p. 5) by this Court.

Point 2: In *National Labor Relations Board* v. *Express Publishing Company, supra,* this Court held that although a violation of Sec. 8 (5) of the Act might be a technical violation of Sec. 8 (1) and Sec. 7 of the Act, the Board was not justified in making a blanket order restraining the employer from committing any act in violation of the Statute, however unrelated it may be. The Board on the basis of the two isolated incidents herein, held that Petitioners violated Sec. 8 (3) and 8 (1) of the Act, and issued an order restraining the Petitioners from violating practically the entire Act (R. 352-353). The Petitioners contend that the principles of the *Express Publishing* case are applicable herein and the broad order of the Board was unjustified.

Point 3: This Court held in *Consolidated Edison Co. et al.* v. *National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206, that the findings of the Board must be supported by substantial evidence. Petitioners contend that an analysis of the record shows that the vital evidence is uncorroborated hearsay and that the total evidence is not adequate to support the conclusions of the Board.

Point 4: In regard to the award of back pay: at the time of the hearing Doran, the discharged employee, had a better paying position for a probationary period. She did not desire to return to Petitioners if she could keep her new job (R. 91). She was granted the right to elect to return as of the date when her probationary period expired (R. 350). She did not return. Petitioners contend that if she had returned, they would be entitled to deduct from their

liability, her earnings to the date she exercised her option, being the date she might have sought reinstatement. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 S. Ct. 904. The Court below held that her damage was to be measured as of the date she began to earn as much elsewhere.

ARGUMENT

POINT I

The petition presents an important question of Federal law, involving the effect of this Court's decision in *National Labor Relations Board* v. *Express Publishing Company* which decision has resulted in diverse interpretations by the Circuit Courts, causing a serious state of confusion.

National Labor Relations Board v. *Express Publishing Company*, 312 U. S. 426, 61 S. Ct. 693, was decided on March 3, 1941. Since that time the case has been sighted with varying divergences some seventy-five times (Judge Clark, Petition, p. 6).

Most of the United States Circuit Courts of Appeal have held that the principles of the *Express Publishing* case were applicable to violations of the Act in addition to Sec. 8 (5). Those Courts are: Fifth Circuit, *National Labor Relations Board* v. *Tex-O-Kan Flour Mills*, 122 F. 2d 433; Seventh Circuit, *National Labor Relations Board* v. *Burry Biscuit Corporation*, 123 F. 2d 540; Ninth Circuit, *National Labor Relations Board* v. *Grower-Shipper Vegetable Assn. of Central California et al.*, 122 F. 2d 368; Tenth Circuit, *National Labor Relations Board* v. *Continental Oil Co.*, 121 F. 2d 120.

Other United States Circuit Courts of Appeal have held that the law of the *Express Publishing* case is limited to a violation of only Sec. 8 (5) of the Act. Those Courts are:

Second Circuit, *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586; Fourth Circuit, *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532.

Judge Clark, in his concurring opinion (Petitioner, p. 6) in the case of *National Labor Relations Board* v. *Standard Oil Co.* sights the First Circuit as being in harmony with the decisions of the Second Circuit. He referred to the case of *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 1 Cir., 118 F. 2d 874, certiorari denied 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549. However, a study of that case indicates that said Court did not limit itself to the strict interpretation of the *Express Publishing* case which was adopted by the Second Circuit. The First Circuit held that it reached its decision on that part of the law of the *Express Publishing* case which held that a wider restraining order would be issued where there were persistent attempts by varying methods to interfere with the rights of self organization and where danger of the commission of other violations was to be anticipated by the employer's past conduct.

The United States Circuit Court of Appeals for the Second Circuit is itself sharply divided. Judges Learned Hand and Swan held "to issue an injunction under § 8 (1) the employer must have done something not specifically mentioned in the other subdivisions of § 8". (Petition, p. 4). Notwithstanding their belief that the *Empire Publishing* decision was not limited to the facts of that case, they determined to adhere to the prior decision of other judges of the Second Circuit "until the Supreme Court passes upon the question again" (Petition, p. 5).

It is evident that judges of the Circuit Courts are soliciting a clarification of this point. Until this Court passes upon the specific points raised in the aforesaid decisions and by the Petition herein, the confusion will continue and the Board and all persons affected by the Act will be left in doubt as to their legal rights on this vital matter.

POINT II

Under the principles of the *National Labor Relations Board* v. *Express Publishing Company* case, the mere violation of any subdivision of Sec. 8 of the Act did not justify an order enjoining Petitioners from violating all sections of the Act.

An analysis of *National Labor Relations Board* v. *Express Publishing Company*, 61 S. Ct. 693 indicates that it sets forth the following principles:

1. The Act does not give the Board an authority which Courts cannot rightly exercise, to enjoin all provisions of the statute merely because the violation of one has been found (*Express Publishing, supra*, p. 433).

2. It does not follow that, because the acts of Petitioners which the Board has found to be an unfair labor practice defined by Sec. 8 of the Act, are also a technical violation of Sec. 8 (1), the Board is justified in making a blanket restraining order (*Express Publishing, supra*, pp. 433, 435).

3. The order restraining the violation of additional provisions of the Act can cover only those provisions which are related to those charged and found (*Express Publishing, supra*, p. 435). The tests for determining whether the acts are related are:

A. They must be persuasively related to the proven unlawful conduct (*Express Publishing, supra*, p. 433).

B. They must be so similar or related that the commission of one necessarily or rightly admits restraining all (*Express Publishing, supra*, p. 435).

C. They must give indication that in the future Petitioners would engage in all or any of the numerous other

unfair labor practices defined by the Act (*Express Publishing, supra,* pp. 436-437).

D. They must bear some resemblance to that which Petitioners have committed or that danger of their commission in the future is to be anticipated from the course of their conduct in the past (*Express Publishing, supra,* pp. 435-436).

4. The record must disclose persistent attempts by varying methods to interfere with the right of self organization (*Express Publishing, supra,* pp. 437-438).

It is respectfully submitted that the same law and the same tests should apply to the facts in this case.

The case which seems closest in fact is *National Labor Relations Board* v. *Newark Morning Ledger Co.,* 120 F. 2d 262, in which certiorari was denied, 62 S. Ct. 363, 314 U. S. 693. In that case one employee, Miss Fahy, who was President of Newark Newspaper Guild was discharged. The employer gave as the reason a program of economy and efficiency. The Board claimed it was the result of her union membership and activity. The Circuit Court accepted the Board's finding of fact. The Court decided:

> "* * * Upon the sole basis of the finding of an isolated act involving the discharge of a single employee the Board has entered a blanket order restraining the Ledger Company from hereafter committing any act in violation of the statute however unrelated it may be to the one act found to have been previously committed. The Company is thus, for example, enjoined, under pain of punishment for contempt, from dominating or contributing support to a labor organization in violation of Section 8 (2) altho there is no evidence that it has ever heretofore done so: * * *."

The Court held that the blanket restraining order was not justified and certiorari was denied by this Court.

Likewise in the instant case one employee was discharged. It may be argued that the conversation of Lombardi with Doran in June 1941 (Petition, p. 2; Brief, pp. 11-12) added a cumulative element. It must be remembered that Doran did not bother to influence any employees (R. 54). Applying the various tests, enumerated above in the Express Publishing case, there is absolutely no evidence in the record to prove or even to indicate that Petitioners had an anti union policy, that they authorized or permitted Lombardi to enforce such policy or that they did anything directly or indirectly to violate or cause the violation of any provision of the Act.

In determining the intent of the Petitioners and whether from their past conduct future violations of the Act are to be anticipated, consideration should be given to the fact that the two incidents are spaced in a period of almost a year apart and involve the same forelady and employee although there were approximately five hundred employees in that one department (R. 223).

The mere fact that Lombardi may have on two occasions made statements to Doran alone cannot indicate an intent or plan on the part of Petitioners to violate the Act. This is particularly true when there is no evidence to show that Petitioners ever orally or in writing stated or indicated their disapproval of the Act. This point is strengthened because there is no evidence to show that Doran, the union or anyone else ever complained to the Petitioners, or called their attention to Lombardi's statements, so that Petitioners could have had the opportunity to disaffirm and counteract such statements.

There are cases where employers have been held responsible for the acts of their supervisors. But a reading of those cases clearly shows that they differ in every respect from the instant one. In *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 61 S. Ct. 320, many

of the supervisors spoke to large groups of employees threatening reprisals for union support. The employer was advised of the activities of his employees but took no steps to notify the employees that such activities were unauthorized, or to correct the impression of the employees that support of the union was not favored by the employer. Surely under circumstances like that there can be no doubt as to the future conduct of the employer which is to be anticipated from its past practices.

Likewise in the cases of *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 61 S. Ct. 83 and *National Labor Relations Board* v. *Link Belt Company*, 311 U. S. 584, 61 S. Ct. 358, there were flagrant courses of conduct by the employer which created forces at work in the plant, making tenable the Board's Conclusions that the employer had intruded and effectively restrained the employees' rights guaranteed by the Act.

But the test of employer's guilt requires a greater amount of evidence and stronger testimony than was adduced herein. The test is:

> "If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice, and if the employer may fairly to be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere (Link Belt Co. supra, 311 U. S. 584, 599)".

Surely under the facts in the instant case there was absolutely no evidence to prove that in the two incidents involved any employee was improperly restrained or that the Petitioners may fairly be charged with the responsibility for their occurrence.

Not only is there an absence of evidence to show union antagonism by Petitioners (R. 235), but Lombardi herself was willing to reinstate Doran in spite of the Board's

claim that Doran's discharge was motivated by her union membership. If Doran had apologized to Lombardi personally at the time she was discharged she would have been reinstated by Lombardi (R. 232). Even at the time of the hearing Lombardi was ready to reinstate Doran if she apologized for her conduct which Lombardi deemed detrimental to proper discipline and respect (R. 233).

Notwithstanding all of the above, if it is held that Doran was discharged illegally in violation of Section 8 (3) of the Act, under the principles of the Express Publishing Company there is no legal justification for the order which among other things requires Petitioners to:

> "1. Cease and desist from:
>
> * * * * * * * *
>
> (b) "In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act (R. 352-353)".

The record is bare of any evidence to indicate that from Petitioners' past conduct there is danger that Petitioners will "in any other manner" interfere with or coerce their employees in the right to self organization, to form labor organizations to bargain collectively, etc. There is nothing in the record to show that Petitioners' past conduct bears resemblance to or is related to the rights guaranteed by the other subdivisions of Section 8 of the Act.

POINT III

The findings, conclusions and order of the Board are not supported by a substantial amount of evidence nor by proper evidence.

The above arguments were made on the assumption that the facts as found by the Board were supported by legal evidence. It is submitted that there was no substantial evidence to justify the findings of the Board.

This Court defined substantial evidence in *Consolidated Edison Company et al.* v. *National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206:

> "* * * Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> * * * The statute provides that the rules of evidence prevailing in Courts of law and equity shall not be controlling. * * * But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence" (see also National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300, 59 S. Ct. 501, 505).

In regard to the incident of June, 1941 wherein Lombardi is alleged to have spoken to Doran and De Filippi to dissuade other employees from joining a union, it cannot be seriously contended that there was a violation of the Act by Petitioners. Aside from the fact that Lombardi denied ever having made any anti-union statements (R. 233), Doran admitted that she did not bother to do anything about it (R. 54). Both Doran and De Filippi were so little affected by the request that they subse-

quently signed up with a union (R. 47). And most important there is absolutely no evidence that Petitioners authorized the statement or had any anti-union policy. There is no evidence that any one ever called it to their attention so that they could publicly repudiate it.

In regard to the discharge of Doran in the following year, the Board realized that it was necessary to prove that Lombardi actually knew that Doran was a member of a union in order to ascribe an illegal motive for her discharge. The Trial Examiner himself emphasized this point when he said:

> "* * * One of the issues in this case is whether the respondent knew whether or not Louise Doran was a member of the union. That is a part of the Board's affirmative case. I assume, that Mr. O'Gorman is questioning this witness for the purpose of establishing that fact. I do not know what other proof he has or what other witnesses to call. That is his burden, the main part of the burden. I will let him support it" (R. 29).

This is how the Board tried to prove the "main part" of its burden. It called De Filippi as its own and first witness (R. 45). She was a close friend of Doran (R. 59). She was instrumental in inducing Doran to become interested in a union (R. 54-55). In the course of conversation Lombardi told her that she had heard that she was at a union. There was no other conversation between Lombardi and her in regard to unions (R. 14). De Filippi specifically and definitely denied that at the said time or any other time did Lombardi say that she knew that Doran was also at a union meeting (R. 14-15, 18). She admitted that she had told Doran that Lombardi knew that Doran was at a meeting. She said that she made that statement because Lombardi knew wherever she went both she and Doran went together (R. 25).

It was an inference on De Filippi's part, not based on anything Lombardi had said to her (R. 31-32).

The substantial part of the Board's case was built on that inference. Doran's evidence was based on what De Filippi told her (R. 83). Corroborating testimony was a mere repetition of the same inference (R. 126-130). No one testified on direct knowledge as to what Lombardi said, excepting De Filippi, and she denied that Lombardi ever said anything about Doran's union activities.

This is definitely a case where a witness creates an inference which is contrary to the facts, and repeats it to others. The Board then takes this testimony which when repeated is hearsay, and claims that the accumulated hearsay is binding although the party who invented the inference admits there was no factual justification for it. It is submitted that such evidence is not the kind of evidence this Court refers to when it speaks of substantial evidence.

It cannot be claimed that the conflicting testimony of Doran and Lombardi as to the circumstances connected with Doran's discharge was corroborating evidence sufficient to substantiate the hearsay evidence based on an inference. It is not corroborating evidence because in the absence of proof of knowledge by Lombardi as to Doran's union activity, the circumstances connected with Doran's discharge show that she was either discharged for good cause or at the whim of Lombardi. If Lombardi was not impelled to discharge Doran for the purpose of defeating the Act she was legally permitted to discharge her for any reason whatsoever. It not having been proved that Lombardi had knowledge of Doran's activities the Board has failed to prove its case by substantial evidence.

Equally important is the fact that even if the Board had proved the above matters by proper evidence it would still not be binding on Petitioners. (See discussion on parallel argument, Brief, pp. 21-22). There was absolutely

no evidence direct or indirect, that Petitioners had knowledge of the situation, that they authorized it, that it was called to their attention or that they were given an opportunity to publicly disclaim or condemn Lombardi's conduct.

Finally Lombardi herself evidenced her indifference to Doran's union activities by offering to reinstate her upon her apology at the time she was discharged (R. 232), and also at the time of the hearing (R. 233), and lastly when she promoted to Doran's position, Eleanor, Doran's intended sister-in-law (R. 137), who was also a member of the union (R. 82).

POINT IV

The provisions in the order relating to back pay are improper.

Petitioners object to paragraph 2(b) of the order (R. 353), which provides that if Doran does not seek reinstatement she shall be paid from the date of discharge to the date she received employment elsewhere. Petitioners contend that the formula should parallel paragraph 2(a), and should cover the period from discharge to reinstatement (R. 353) or the offer of reinstatement or the date when Doran had the right to exercise her option to be reinstated.

Doran was employed elsewhere and at a higher salary at the time of the hearing of July, 1942 (R. 87). She was employed for a trial period which did not expire until August, 1942 (R. 91). Only if she did not keep her new job did she desire to return to Petitioners (R. 90).

The Court below held that when she finally elected not to be reinstated, the wrong so far as it can be measured in dollars ceased as soon as she began to earn as much elsewhere (R. 362).

This Court held in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 S. Ct. 904:

> "the order is criticized as arbitrary in that it is said to award back pay to date of reinstatement with deduction only for what was earned to the date of the order. We do not so read it, and the Board admits that credit must be given for all sums earned to date of reinstatement, and so construes the order."

On this basis computations are made as of the date of reinstatement. Doran was given the right to be reinstated on a date subsequent to that of the order. Her damages are measured as of that date. The fact that she elected not to be reinstated does in no way affect the calculation of the amount of damage she suffered.

In *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 61 S. Ct. 845, this Court held that workers are to be made whole for "only actual losses". Surely neither Doran nor anyone else could calculate what damages she suffered because of her discharge, at the time of the hearing or on the date of the order. Only in August, 1942 when she apparently made up her mind not to return to Petitioners could she know what her damages really were.

In any event under the decision of this Court in *Phelps Dodge Corp.* v. *National Labor Relations Board, supra*, the Board's order was defective, because even if it was allowed a wide discretion to determine procedural devices, it should at least have taken proof of Doran's damage on its own formula. The amount payable to Doran "should not have been left for possible final settlement in contempt proceedings" (*Phelps Dodge Corp., supra*, 61 S. Ct. 845, 854).

Conclusion

It is submitted that the Petition for a writ of certiorari should be granted in order that this Court may settle the effect and application of the principles enunciated in its decision in *National Labor Relations Board* v. *Express Publishing Company* so that the diversity of opinion among the various Circuit Courts may be eliminated; and with the clarification of the law the rights of the Petitioners herein be established.

Respectfully submitted,

HERBERT L. WASSERMAN,
Attorney for Petitioners.

Dated, New York, N. Y., February 8, 1944.